

# Administrative Searches and Inspections by Municipal Code Enforcement Officers

By KEVIN J. BEST

Violations of municipal ordinances regulating public nuisances and zoning often spawn impassioned complaints by residents to mayors and council members, which in turn place pressures upon the code enforcement officer who may often feel reluctant to pursue the complaint. Reluctance may stem from a fear of subjecting the city or town to legal liabilities rising from violations of a resident's rights under state law or federal constitutional rights.

Municipal code enforcement officers may simply be hesitant to take action if they think they must obtain a search warrant before thoroughly pursuing an investigation. The purpose of this article is to provide an overview of the types of actions a code enforcement officer can take without a search warrant and to discuss the situations that substantiate the need for an administrative search warrant.

## Background

The Fourth Amendment to the U. S. Constitution prohibits a government official from unreasonably rummaging through or taking custody of a citizen's "person, houses, papers, and effects" without a warrant issued by an impartial judge that minimizes the intrusion into a citizen's privacy. However, there are several circumstances where the U. S. Supreme Court has ruled it is not unreasonable to conduct a search or seizure without a warrant or without probable cause.

The reasonableness of a search or seizure depends on a person's level of expectation of privacy that is recognized by society as reasonable, which is weighed against the government's interest. Furthermore, a judge should issue the warrant only when it can be shown that the government has sufficient proof or probable cause that a crime or code violation exists. "Probable cause" is simply the amount or weight of evidence that a violation or crime has occurred that is necessary to properly convince a judge to allow a warrant to be issued.

Probable cause exists where there is more evidence favoring a suspicion of a violation than evidence against the suspicion. Probable cause in a criminal case is less than the "preponderance-

of-the-evidence" standard used in civil trials and much less than the "beyond-a-reasonable-doubt" standard used to convict in criminal trials. Therefore, probable cause is more than just an explainable suspicion or hunch that a violation exists but less than enough to show it is more likely than not that the illegal act was committed or the violation exists. However, as will be explained below, the courts relax probable cause for administrative purposes including obtaining an administrative search warrant by a code enforcement official.

## Inspections Without a Warrant

**Public Observation.** As mentioned, the Supreme Court has carved out numerous exceptions allowing both police in criminal investigations and code enforcement officers conducting authorized inspections to execute searches without a warrant. It is common sense but worthwhile to emphasize that code enforcement officers do not need a warrant to inspect premises from a public vantage point or from a neighboring private property with permission from the owner/occupier. An officer may observe a violation with his naked eye or by using other technology aids from any public place or any location where the officer has permission to be, including publicly navigable airspace.



A code enforcement officer may observe a violation from a public area on private property where the public is invited to enter such as a shopping plaza, a common area in an apartment building or look over fences from the vantage point of a utility pole or a nearby multi-story building or through openings in fences. Furthermore, as long as the object viewed is perceptible to the naked eye, the code officer may use aids of whatever type to enhance his view without infringing upon a person's constitutional rights. Nor does photographing to record the nature of an observation constitute an unreasonable search despite the fact that the camera and computer software can be used to observe items in more detail than the naked eye could perceive. However, if the purpose of the technological aid is to view that which cannot be seen without it, it can be an invasion of a person's reasonable expectation of privacy.

**Emergencies.** Municipal codes usually authorize warrantless entries upon private property in cases of fire or in other emergency situations where there is imminent danger of loss of life, limb or property.

**Consent.** Some municipal codes appear by their plain language to grant officers broad power to enter any building deemed necessary by the code enforcement officer and to enter with or without permission from the occupant/owner for the purpose of enforcing ordinances; however, in the absence of a bona fide emergency, the officer must first obtain a warrant unless the appropriate person consents to the inspection.

If a person who owns or leases property or otherwise possesses common authority over the premises, gives consent to inspect, a code enforcement officer may conduct an inspection without a warrant. A person possesses "common authority" if he reasonably appears to have joint access or use of a property through permission of the person who pays the rent or owns the property. For example, if a girlfriend of a tenant convinces an officer that she also legitimately resides in the apartment, then the tenant is said to assume the risk to any invasions of his privacy permitted by his housemate. The officer only need show that he had a reasonable basis, from an objective standpoint, for believing the person giving consent actually had the authority to do so.

If it turns out the consenting person did not actually have authority to consent, the search is still considered acceptable as long as the officer acted reasonably and in good faith. Also, a landlord cannot consent to an inspection of a house or apartment, which he has rented to another unless the owner also has joint use or permission from the tenant to fully access the space.

If a property owner or manager consents to an inspection and then revokes that consent, the code enforcement officer must immediately vacate the premises. Of course, any information gleaned by the officer while validly on the property may be used against the violator in a citation or in providing probable cause to obtain a warrant to return for further inspection.

### Inspections Requiring a Warrant

Generally an inspection conducted under an emergency or exigent situation, with proper consent or from a public vantage point does not require a warrant; however, in the event none of these conditions exist, a code enforcement officer must obtain an administrative search warrant from a judge or magistrate if the occupant refuses to cooperate. An administrative search warrant allows a regulatory agency to search specified premises and is generally more easily obtained than a warrant seeking to search a place for evidence leading to a typical criminal arrest and prosecution.

Probable cause for the issuance of an administrative search warrant may be established by at least two methods including (1) by investigating a specific property concerning a suspected violation, or (2) conducting an area-wide inspection of properties in order to discover violations that may impact the health, safety or welfare of urban residents. Using the first method, the administrative inspector must give some underlying factual data behind the inspector's suspicion of a violation that is sufficient to establish the credibility and basis of knowledge of the informant or officer.



Through the two methods mentioned above, a code enforcement officer must provide the judicial authority with sufficient information for the official to believe that the inspecting officer has a right to enter and inspect the property under a local ordinance or statute and that doing so will further the officer's duties of inspecting the property for the purposes allowed by law.

In addition to providing evidence for a specific property violation, if a code enforcement officer is conducting property inspections as part of a **systematic program based on standards provided for by reasonable legislative or administrative policies**, then the existence of a program or policy authorized by law will also constitute probable cause. "Such standards, which will vary with the municipal program being enforced, may be based upon the passage of time, the nature of the building (e.g. a multifamily apartment



house), or the condition of the entire area, but they will not necessarily depend upon the specific knowledge of the condition of the particular dwelling." (*Camara v. Municipal Court*, U. S. Supreme Court, 1967)

### Procedures to Obtain an Administrative Search Warrant

In the event a property owner refuses entry to a properly identified code enforcement officer conducting an inspection with a reasonable belief based on personal observation, in response to a reliable complaint that a specific violation exists or in accordance with a routine inspection program established by law, the officer may seek an administrative search warrant to enter the premises without the owner/occupier's consent.

Article 38A, Section 8B of the *Annotated Code of Maryland*, provides authority for administrative search warrants relating to fire marshals enforcing fire prevention codes but there is no specific provision in either Maryland statutory law or the rules of Maryland's courts that expressly provides authority to obtain an administrative search warrant for the purposes of enforcing a local building code or investigating a public nuisance. Therefore, a local jurisdiction must provide authority for such warrants by local ordinance particularly when showing probable cause using the method dealing with routine, systematic inspections. The following is an extract from the *Code of the City of Westminster* providing authority to city code enforcement officers in obtaining an administrative search warrant:

Section 119-22B *Right of Entry; Administrative search warrants.* The code official or deputy code official(s) may apply to a judge of the district court or circuit court for an administrative search warrant to enter any premises to conduct any inspection required or authorized by law to determine compliance with the provisions of this code.

- (1) The application for an administrative search warrant shall be in writing and sworn to by the applicant and shall particularly describe the place, structure, premises, etc., to be inspected and the nature, scope and purpose of the inspection to be performed by the applicant.

- (2) Before filing an application for an administrative search warrant with a court, the code official and/or deputy code official(s) shall obtain approval by the city attorney as to its legality in both form and substance under the standards and criteria of this section and a statement to this effect shall be included as part of the application.
- (3) A judge of a court referred to in this section may issue the warrant on finding that:
  - (a.) The applicant has sought access to the property for the purpose of making an inspection; and
    - [1] after requesting, at a reasonable time, the owner, tenant or other individual in charge of the property to allow access, has been denied access to the property; or
    - [2] after making a reasonable effort the applicant has been unable to locate any of these individuals.
  - (b.) The requirements of subsections 1 and 2 of this section are met.
  - (c.) The code official and/or deputy code official(s) is authorized by law to make an inspection of the property for which the warrant is sought, and
  - (d.) Probable cause for the issuance of the warrant has been demonstrated by the applicant by specific evidence of an existing violation of any provision of this code or any rule or regulation adopted under this code or by showing:
    - [1] that a reasonable administrative inspection program exists regarding the condition of the property, and
    - [2] that the proposed inspection comes within that program.
- (4) An administrative search warrant issued under this section shall specify the place, structure, premise, vehicle or records to be inspected. The inspection conducted may not exceed the limits specified in the warrant.
- (5) An administrative search warrant issued [under] this section authorizes the applicant and other officials or employees of the city to enter specified property to perform the inspection, sampling and other functions authorized by law to determine compliance with the provisions of this code.
- (6) An administrative search warrant issued under this section shall be executed and returned to the judge by whom it was issued within:
  - (a.) The time specified in the warrant, not to exceed thirty days; or
  - (b.) If no time period is specified in the warrant, fifteen days from the date of its issuance.

## Conclusion

Code enforcement officers possess significant authority to conduct lawful inspections without the need for a warrant; however, obtaining an administrative search warrant can be used to enforce local codes in the event the property owner/occupier refuses to cooperate. There is no statutory authority in state law authorizing the issuance of an administrative search warrant for the purpose of enforcing municipal building and zoning codes. Each municipality must provide authority for administrative search warrants by local ordinance.

When a code enforcement officer has adequate training and knowledge of the officer's authority, the officer can more confidently and effectively decrease overall code violations while minimizing litigation by disgruntled citizens against the officer and the municipality. ■

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